82-2094

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

SIDNEY J. WEBB

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether Section 334(g)(1) of the Social Security Amendments of 1977, which creates an exception to the provision requiring that Social Security spousal benefits be reduced by the amount of government pension benefits, was intended to incorporate the gender-based dependency test that existed in the Social Security Act prior to *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).

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The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-4a) is reported at 701 F.2d 81. The opinion of the district court (App. B, *infra*, 5a-14a) is reported at 509 F. Supp. 1091. The opinions arising out of the administrative proceedings (Apps. G, H, and I, *infra*, 20a-22a, 23a-36a, 37a-44a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 16a-17a) was entered on March 7, 1983. On May 27, 1983, Justice Rehnquist extended the time

for filing a petition for a writ of certiorari to and including June 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in App. J, *infra*, 45a-49a.

STATEMENT

This case involves the construction of the exception to the pension offset provision of the Social Security Amendments of 1977 (Pub. L. No. 95-216, Section 334(g)(1), 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note; App. J, *infra*, 47a-48a). The question presented here is closely related to those in *Heckler* v. *Mathews*, probable jurisdiction noted, No. 82-1050.

1. The Social Security Act provides spousal benefits for the wives, husbands, widows, and widowers of retired and disabled wage earners (42 U.S.C. (& Supp. V) 402(b), (c), (e), and (f)). Spousal benefits are based on the earnings of the retired or disabled wage earners, and are available to persons age 62 or over who are entitled to either minimal or no old-age or disability benefits on their own account. Prior to December 1977, the Act imposed a dependency requirement on men seeking spousal benefits; under this standard, benefits were payable only if husbands or widowers could demonstrate dependency on their wage-earner wives for one-half of their support. Former 42 U.S.C. 402(c)(1)(C) and (f)(1)(D). Women, on the other hand, could qualify for benefits without having to satisfy a dependency requirement. 42 U.S.C. 402(b).

On March 2, 1977, this Court held that the one-half support requirement for widowers' benefits under former 42 U.S.C. 402(f) violated the equal protection

component of the Due Process Clause of the Fifth Amendment. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). Thereafter, on March 21, 1977, the Court summarily affirmed two district court decisions striking down the one-half support requirement for husbands' benefits. *Califano* v. *Silbowitz*, 430 U.S. 924 (1977); *Califano* v. *Jablon*, 430 U.S. 924 (1977).

Following these decisions, Congress amended the Social Security Act in December 1977. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 42 U.S.C. (Supp. V) 401 *et seq.* In light of this Court's rulings, Congress eliminated the one-half support eligibility requirements for widowers' and husbands' benefits. Section 334(b)(1) and (d)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402(c)(1) and (f)(1); see S. Rep. No. 95-572, 95th Cong., 1st Sess. 88, 93 (1977).

At the same time, Congress realized that elimination of the one-half support requirements would create a serious fiscal problem for the Social Security trust fund. Generally, a person entitled to two different Social Security benefits does not receive the full amount of both benefits; rather, the benefits are offset against each other so that the primary Social Security payment is reduced by the amount of the second benefit. 42 U.S.C. 402(k)(3)(A).[1] In 1977, however, federal and state government pensions were not subject to the general offset provisions of the Social Security Act, and therefore a recipient of such a pension could receive both the government pension

[1] For example, if an individual is entitled both to benefits on his own work account and to spousal benefits, the worker's benefit is paid in full, with spousal benefits limited to the amount, if any, by which those benefits exceed the worker's benefit.

and unreduced spousal benefits under the Social Security Act. Elimination of the one-half support requirements made substantial numbers of retired federal and state employees eligible for unreduced spousal benefits based on their spouses' earnings. "This result[ed] in 'windfall' benefits to some retired government employees." S. Rep. No. 95-572, *supra*, at 28. Congress estimated that these windfall benefits would cost the Social Security system approximately $190 million in 1979 (*ibid.*).

In order to reduce this fiscal drain, Congress included a "pension offset" provision in the 1977 amendments to the Act. Parallel to the already existing offset provision for dual Social Security benefits in 42 U.S.C. 402(k)(3)(A), this offset provision generally requires that spousal benefits be reduced by the amount of certain federal or state government pensions received by the Social Security applicant.[2] Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402(b)(4)(A) and (c)(2)(A). See S. Rep. No. 95-572, *supra*, at 27-28. The offset applies to spousal benefits payable "on the basis of applications filed in or after the month in which this Act is enacted [December 1977]." Section 334(f) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 note.

While the pension offset was a reasonable and equitable means of dealing with windfall spousal ben-

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[2] Government pensions are subject to the offset if the employment upon which the pension is based was not covered under Social Security on the last day the individual was employed. Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402(b)(4)(A) and (c)(2)(A).

efit payments to federal and state retirees who, prior to 1977, had no expectation of receiving them, Congress was concerned about the effect of the new offset provision on those persons—primarily women—who were already retired or soon would retire from government service and who had planned their retirements on the assumption that they would receive full unreduced spousal benefits. Faced with the prospect that this latter group of spouses would, through no fault of their own, be deprived of the benefits they had long expected to receive, Congress chose to exclude them from the pension offset requirement. Thus, Section 334(g)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 note, excepts from the operation of the pension offset those spouses eligible for a government pension prior to December 1982 who would have qualified for full spousal benefits under the Act "as it was in effect and being administered in January 1977." As noted above, in January 1977 the Act required men, but not women, to demonstrate dependency on their wage-earner spouses in order to receive spousal benefits.

2. In March 1977, respondent retired from his position with the Public Utilities Commission of the State of California and began receiving a state pension (App. B, *infra*, 6a). In August 1977, respondent's wife applied for her retirement benefits under the Social Security Act. One month later, in September 1977, respondent submitted an application for husband's benefits on his wife's account. However, respondent was not eligible for spousal benefits until December 1977 (*id.* at 5a), and therefore his application was deemed to have been filed in that month (*id.* at 6a). Respondent did not receive one-half of his support from his wife (*id.* at 11a).

In September 1978, the Social Security Administration notified respondent that his monthly spousal benefit would be reduced by the amount of his state pension in accordance with the pension offset provision that had been enacted as part of the Social Security Amendments of 1977. Because respondent's pension exceeded his spousal benefits, no net payments under the Social Security Act were due him. In addition, the Social Security Administration advised respondent that he had been overpaid $394.50 between December 1977 and September 1978 because the offset provision had not been applied to him as required (App. B, *infra*, 6a; App. H, *infra*, 30a, 35a). Upon respondent's request for reconsideration, the Social Security Administration's initial decision was reaffirmed (App. I, *infra*, 37a-44a).

Thereafter, respondent was granted a hearing before an administrative law judge. The ALJ concluded that the pension offset provision of the 1977 amendments applied to respondent and that respondent did not come within the exception to the offset because he "did not meet the support requirements in effect in January 1977" (App. H, *infra*, 33a). In addition, the ALJ found that recovery of the overpayments should be waived in light of "equity and good conscience" because respondent was without fault (*id.* at 34a-35a). The decision of the ALJ was affirmed by the Appeals Council on March 27, 1980, and became the final decision of the Secretary of Health and Human Services (App. G, *infra*, 20a-22a).

3. Respondent then brought this action in the United States District Court for the Northern District of California under Section 205(g) of the Social Security Act, 42 U.S.C. (Supp. V) 405(g). On cross-

motions for summary judgment, the district court construed the exception clause to encompass respondent and therefore to exempt him from the offset provision (App. B, *infra*, 5a-14a). The court recognized that the exception clause, as written, incorporated the eligibility standard of the Social Security Act "as it existed and was administered in January of 1977," including "the requirement that the husband must have been receiving one-half of his support from his spouse" (*id.* at 11a). However, the court believed that such a gender-based provision was of "questionable constitutionality" in light of this Court's decisions in *Goldfarb*, *Silbowitz*, and *Jablon* (*id.* at 12a). Noting that "[w]hen alternative constructions of a statute are possible, the court must choose that interpretation which will avoid a declaration of unconstitutionality" (*id.* at 12a-13a), the court held "that only those *constitutional* portions of the Social Security Act as it stood in January 1977 are to serve as the measure of whether an individual has fulfilled the requirements necessary to qualify for the exception" (*id.* at 13a; emphasis added).

The court of appeals affirmed the district court's interpretation of the statute (App. A, *infra*, 1a-4a). While acknowledging that "[t]he *language* of [the exception clause] appears clear enough" and would exclude respondent (*id.* at 4a; emphasis in original), the court stated that it "must inquire into Congress' intent" (*ibid.*). On that basis, the court held that "a fair interpretation [of the exception clause] is that Congress did not intend to enact unconstitutional legislation" (*ibid.*). Therefore, it "agree[d] with the district court that a better interpretation of [the exception clause] is that, when Congress referred to the 'requirements . . . in effect and being administered

in January 1977,' it meant only the *constitutional* requirements" (*ibid.*; emphasis in original).

REASONS FOR GRANTING THE PETITION

This case is closely related to the appeal in *Heckler* v. *Mathews*, probable jurisdiction noted, No. 82-1050.[3] In *Mathews*, the lower court held unconstitutional the exception to the pension offset provision of the Social Security Amendments of 1977 (Pub. L. No. 95-216, Section 334(g)(1), 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note; App. J, *infra*, 47a-48a) on the ground that the exception incorporates a gender-based dependency test that this Court had invalidated as a substantive eligibility standard in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). In the instant case, the court below, in order to avoid that constitutional issue, construed the exception clause not to incorporate a gender-based test.

The question whether the Due Process Clause prohibits such a gender-based test in the exception provision is squarely presented by our jurisdictional statement in *Mathews*. For the reasons stated in our brief in *Mathews*, we submit that the exception is not unconstitutional. Since the strained interpretation of the exception provision adopted by the decision below was premised on the need to avoid that constitutional issue, the Court's resolution of the validity of the exception necessarily will bear on the court of appeals' reading of the clause.

Moreover, in the motion to affirm in *Mathews*, appellee has raised the same issue of statutory construc-

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[3] The court of appeals' decision in this case was rendered shortly before the Court noted probable jurisdiction in *Mathews*. We are serving respondent with a copy of our brief in *Mathews*.

tion that was decided in this case. Consequently, we have fully addressed the issue in our brief in *Mathews*. For the reasons there stated, we submit that the exception was intended to incorporate the gender-based standard of pre-*Goldfarb* law. It thus appears that the Court's decision in *Mathews* will directly resolve the statutory question presented here.

Accordingly, the Court should hold this petition pending its decision in *Mathews*.[4]

CONCLUSION

The petition for a writ of certiorari should be held pending decision in *Heckler* v. *Mathews*, No. 82-1050, and then disposed of in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

JUNE 1983

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[4] Because respondent was denied benefits prior to October 1979, he is not a member of the nationwide class certified by the district court in *Mathews*. See 82-1050 J.S. App. 10a-11a.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-4256

D.C. CV 80-1667 R.P.A.

SIDNEY J. WEBB, PLAINTIFF-APPELLEE

v.

RICHARD S. SCHWEIKER, Secretary of Health and Human Services, DEFENDANT-APPELLANT

[Filed March 7, 1983]

Appeal from the United States District Court
for the Northern District of California
The Honorable Robert P. Aguilar,
District Judge, Presiding

Argued March 12, 1982

Submitted July 23, 1982

Before: GOODWIN and ANDERSON, *Circuit Judges*, and JAMESON,* District Judge

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* The Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

OPINION

J. BLAINE ANDERSON, Circuit Judge:

The Secretary of Health and Human Services ("Secretary") appeals a district court judgment finding Webb exempt from the husband's "pension offset" provision of the Social Security Act. Social Security Act § 202(c)(2)(A), 42 U.S.C. § 402(c)(2)(A). To avoid repeating the fact statement in the district court's reported opinion, *Webb* v. *Harris*, 509 F.Supp. 1091 (N.D. Cal. 1981), only a brief summary of the facts is offered here.

Webb retired on March 31, 1977, from his job with the California Public Utilities Commission. He immediately began receiving a state pension. On December 2, 1977, Webb satisfied all requirements for husband's insurance benefits under § 202(c) of the Social Security Act ("Act"), 42 U.S.C. § 402(c), and began receiving benefits soon thereafter. Eighteen days later, on December 20, 1977, Congress enacted the pension offset provision which took effect "for months beginning with the month in which this Act is enacted." Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(f), 91 Stat. 1510, 1546 (1977). Webb received husband's benefits through August, 1978, when the Secretary informed him that, due to the pension offset provision, he was no longer entitled to receive benefits. The Secretary terminated payments and sought recovery of the benefits Webb had been "overpaid."

The district court ruled that the pension offset provision did not apply to Webb because he fell within its so-called "grandfather clause." That clause exempts from the pension offset provision individuals who were receiving or became eligible to receive gov-

ernment pensions within five years of December, 1977, and who, when they applied for husband's benefits, met the requirements for entitlement to such benefits as those requirements existed in January, 1977. Social Security Amendments of 1977, Pub. L. 95-216, § 334(g)(1), 91 Stat. 1510, 1546-47 (1977). Webb met all requirements for husband's benefits as they existed in January, 1977, except the requirement that the husband must be receiving one-half support from his wife at the time she became eligible for benefits. Emphasizing that the one-half support requirement was declared unconstitutional in March, 1977, *Califano* v. *Silbowitz*, 430 U.S. 924, 97 S.Ct. 1539, 51 L.Ed.2d 768 (1977); *Califano* v. *Jablon*, 430 U.S. 924, 97 S.Ct. 1539, 51 L.Ed.2d 768 (1977), the district court held that Webb met all the *constitutional* requirements as they existed in 1977, and was therefore exempt from the pension offset provision. We affirm.

Initially, Webb urges that the pension offset provision is unconstitutional retroactive legislation to the extent it affects persons who became eligible for benefits between December 1, 1977 and December 19, 1977. We need not decide that issue because, for purposes of this case, we assume the legislation is retroactive and hold the grandfather clause operative to preserve Webb's claim.

The Secretary contends that the district court strained in interpreting § 334(g)(1) as it did, in an effort to avoid addressing the statute's constitutionality. The Secretary cites the well-known rule that constitutional analysis should be avoided only when a statute presents a fair alternative construction, *see Lewis* v. *United States* 445 U.S. 55, 65, 100 S.Ct. 915, 920, 63 L.Ed.2d 198, 209 (1980), then contends

that the language of § 334(g)(1) is so clear on its face that no fair alternative construction is available. The *language* of § 334(g)(1) appears clear enough. When Congress enacts a statute, however, that on its face purports to rejuvenate legislation previously held unconstitutional, we must inquire into Congress' intent. We believe a fair interpretation is that Congress did not intend to enact unconstitutional legislation.

The district court cited the rule of statutory construction that Congress is presumed aware of the judicial construction of existing law. *Webb* v. *Harris*, 509 F.Supp. at 1094. In the instant case, that presumption is unnecessary because legislative history reveals Congress actually discussed the cases that held the one-half dependency requirement unconstitutional. S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-18 (1977). Indeed, those cases were a motivating force behind the 1977 Social Security Amendments. *See* H. R. Rep. No. 95-702, 95th Cong., 1st Sess. 4, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4155, 4161. In light of this legislative history, we will not attribute to Congress the intent to breathe life into legislation previously invalidated by the Supreme Court. *See Rosofsky* v. *Schweiker*, 523 F.Supp. 1180 (E.D.N.Y. 1981) (holding § 334(g)(1) unconstitutional in the same manner as the one-half dependency requirement). We agree with the district court that a better interpretation of § 334(g)(1) is that, when Congress referred to the "requirements . . . in effect and being administered in January 1977," it meant only the *constitutional* requirements. Accordingly, the district court's orders are

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 80-1667 RPA

SIDNEY J. WEBB, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS, Secretary of Health and Human Services, DEFENDANT

[Filed March 13, 1981]

OPINION AND ORDER

FACTS:

Plaintiff Sidney Webb filed an application for husband's insurance benefits under Title II of the Social Security Act (Act) on September 21, 1977, a month after his wife applied for her retirement benefits. On October 31, 1977, plaintiff was notified that he had been found entitled to husband's benefits as of December 1977, in the amount of $42.90 per month under § 202(c) of the Act, 42 U.S.C. § 402(c), December 1977 being the first month in which plaintiff met all criteria of eligibility. (On December 2, 1977, plaintiff would attain 62 years of age and meet the final requirement for obtaining his husband's benefits).

On December 20, 1977, Congress amended the Social Security Act by enacting a "pension offset" provision, § 202(c)(2)(A), 42 U.S.C. § 402(c)(2)(A)

(enacted by Pub.L.No. 95-216, § 334(b)(2)), which was to take effect "for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted," § 334(f), Pub.L. No. 95-216. Thus, the amendment took effect in December of 1977. Among other changes, the amendment added a provision that the monthly benefit payable to a person receiving husband's insurance benefits must be reduced by an amount equal to the amount of any monthly benefit payable to the husband based upon his earnings while in government service. Plaintiff was employed by the Public Utilities Commission for the State of California until March 31, 1977, and began receiving a state government pension monthly upon the termination of his employment.

Based upon its interpretation of this pension offset provision, in September of 1978, the Social Security Administration notified plaintiff that he was no longer entitled to husband's benefits, and that he had been overpaid $394.50 in benefits for the period December 1977, to August 1978. Plaintiff therafter requested reconsideration of the decision which found him subject to the offset provision and in receipt of $394.50 in overpaid benefits, claiming that as he had filed before December 1, 1977, the offset provision should not apply to his benefits. In a reconsideration decision issued March 26, 1979, the initial determination was affirmed. According to the Administration, an application for monthly benefits filed before the first month in which the claimant meets all conditions of entitlement for such benefits is not deemed a valid application until the month when all such conditions have been satisfied.

Plaintiff then requested and received a hearing before an administrative law judge (ALJ) on his

claim. At the hearing, the ALJ examined the following issues: (1) whether plaintiff was overpaid husband's insurance benefits (which depended on whether plaintiff was entitled to husband's insurance benefits), and (2) if plaintiff was overpaid, whether the Social Security Administration was entitled to recover the overpayment. The ALJ found that plaintiff was not entitled to husband's insurance benefits and did not qualify for any of the Act's exceptions to the offset provision.

The ALJ also found that although plaintiff was overpaid $394.50 in benefits, the plaintiff had "relied on his award of benefits, constituting erroneous information from an official source from the Social Security Administration," and so was deemed without fault. Adjustment or recovery was therefore waived.

Plaintiff requested a review of the ALJ's decision, which was subsequently affirmed by the Appeals Council. Plaintiff, having exhausted his administrative remedies, brings this action for review of an adverse final decision of the Secretary of Health and Human Services (the Secretary) pursuant to § 205 (g) of the Social Security Act, 42 U.S.C. § 405(g).

DISCUSSION:

The Social Security Amendments of 1977, Pub.L. 95-216, amended the existing Social Security Act (42 U.S.C. §§ 301, *et seq.*) to among other things create an offset provision which requires that husband's insurance benefits "shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State . . . if, on the last day he was employed by such en-

tity, such service did not constitute 'employment' as defined in section 410 of this title." Pub.L. No. 95-216, § 334(b)(2)(A), 42 U.S.C. § 402(c)(2)(A). As noted, the amendment applies to monthly insurance benefits "for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted." Pub.L. 95-216 § 334(f). The month of enactment of Public Law 95-216 was December of 1977. Plaintiff asserts that his application was filed prior to December 1977, and that the December amendments therefore do not apply to reduce his benefits. The Secretary contends that plaintiff's application must be deemed filed in December of 1977. This contention is based upon 42 U.S.C. § 402(j)(2), which provides that an application for monthly benefits filed prior to the time an applicant meets all requirements for eligibility shall be deemed a valid application and shall have "[been] deemed to have been filed" when all requirements are satisfied.

Plaintiff first met all criteria for eligibility when he became sixty-two in December 1977. Assuming plaintiff's application was "filed" in December, he would therefore be subject to the pension offset provision enacted in § 202(c) of the Social Security Act, 42 U.S.C. § 402(c)(2)(A). However, there is an important exception contained in the Amendments of 1977 to the operation of the various offset provisions. Section 334(g)(1) of Pub.L. 95-216 provides

> (g)(1) The amendments made by the preceding provisions of this section shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of § 202 of the Social Security Act, to an individual—

(A) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted (or who is eligible in any such month) for a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b)(2) of the Social Security Act); and

(B) who at the time of application for or initial entitlement to such monthly insurance benefit under such subsection (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January 1977.

This exception means that if an individual is eligible or is actually receiving a federal or state government pension in December 1977, through December 1982, and if the individual meets the requirements of the applicable subsection of section 202 of the Act as it existed and was administered in January of 1977, the offset provision will not be applicable.

The husband's insurance benefits plaintiff seeks to obtain are provided for by subsection (c) of § 202 of the Act. In January of 1977, § 202(c) provided, in part, as follows:

(c)(1) The husband (as defined in section 416(f) of this title) of an individual entitled to old-age or disability insurance benefits, if such husband—

(A) has filed application for husband's insurance benefits,

(B) has attained age 62,

(C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual—

(i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to such benefits, or

(ii) if she did not have such a period of disability, at the time she became entitled to such benefits,

and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and

(D) is not entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs: he dies, his wife dies, they are divorced, he becomes entitled to an old-age or disability insurance benefit based on a pri-

> mary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

Plaintiff met all requirements of this section as it existed and was administered in January of 1977 with the exception of the requirement that the husband must have been receiving one-half of his support from his spouse at the time she became eligible for benefits. Plaintiff was not receiving one-half of his support from his wife at this time.

The one-half support requirement for widower's insurance benefits in § 202(f) of the Act, 42 U.S.C. 402(f), was declared unconstitutional by the Supreme Court in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). On March 21, 1977, shortly after *Goldfarb* was decided, the Supreme Court rendered summary affirmances in the cases of *Califano* v. *Silbowitz*, 430 U.S. 924 (1977), and *Califano* v. *Jablon*, 430 U.S. 924 (1977). In each of these cases, a lower court had ruled that the one-half support requirement for husband's insurance benefits in § 202(c) of the Act, the same requirement struck by the Court in *Goldfarb* as to § 202(f), was unconstitutional due to gender-based discrimination. When Congress enacted section 334 (b)(1)(A) of Pub.L. 95-216, it brought section 202(c) of the Act into conformity with these Supreme Court rulings by striking subparagraph (C) of the section, the one-half support requirement.

The question before the Court is whether plaintiff's failure to satisfy § 402(c)(1)(C) bars him from qualifying under the exception to the offset provision. There are three reasons why this Court does not find plaintiff to be so barred. First, the

legislative history of the passing of Pub.L. 95-216 reveals that part of the purpose of the change in the law was in order to eliminate the "gender-based difference of treatment for men and women under present law." 3 U.S. Code Congressional and Administrative News, Legislative History Proclamation, 95th Congress, 1977, p. 4161. It would be anomalous for this intent to be interpreted as a choice to return to an earlier unconstitutional gender-discriminatory standard.

A construction of a statute which thwarts the declared intention and policy of Congress is to be avoided. *Congress of Railway Unions* v. *Hodgson*, 326 F.Supp. 68 (D.C. D.C. 1971). It may be assumed that Congress, in reaching back to the January standard, intended to incorporate the March decision of unconstitutionality into the December amendments by implication. "The legislative will is the all-important or controlling factor, and has been said to be the vital part, the heart, soul and essence of the law. (Citations omitted). In searching for the will and intent, it is to be assumed that Congress was aware of established rules of law applicable to the statute and thus, upon enactment, the statute is to be read in conjunction with the entire body of law." *Kansas City* v. *Federal Pacific Electric Co.*, 310 F.2d 271 at 274-275 (8th Cir. 1962), *cert. denied*, 371 U.S. 912 (1962), 373 U.S. 914 (1963). Congress was presumptively aware of the March Supreme Court ruling on the Amendments, and the subsequently enacted statute must be read with the Court's holding in mind. If this were not done, § 334(g) of Pub.L. 95-216 would be of questionable constitutionality. When alternative constructions of a statute are possible, the court must choose that interpretation which will avoid

a declaration of unconstitutionality. *Lucas* v. *Morton*, 358 F.Supp. 900 (W.D. Pa. 1973).

Second, it is important to keep in mind that Congress enacted the exception to the offset provision (and the provision itself) at the same time that it eliminated the gender-discriminatory language in the 1977 version of § 402(c)(1)(C). It would be irrational for Congress to intend that those falling under the exception to the offset provision must satisfy the gender-discriminatory standard it had just abolished.

Finally, the nature of the Social Security legislation itself must be considered in interpreting § 334(g). Numerous cases have pointed out that the Social Security Act is a remedial statute, to be broadly construed and liberally applied. *Elam* v. *Hanson*, 384 F.Supp. 549 (N.D. Ohio, 1974), and cases cited therein. "In practical terms the principles mean that, when a Social Security Act provision can reasonably be construed in favor of the one seeking benefits, it should be so construed." *Damon* v. *Secretary of H.E.W.*, 557 F.2d 31, 33 (2d Cir. 1977).

Examined in light of the underlying policy considerations of the Social Security Act, logical consistency, and the declared legislative intent of Congress, this Court holds that only those constitutional portions of the Social Security Act as it stood in January 1977 are to serve as the measure of whether an individual has fulfilled the requirements necessary to qualify for the exception. Plaintiff met all constitutional requirements of § 202(c) of the Act as it stood in January of 1977: (1) Plaintiff's application for husband's insurance benefits was filed (§ 202(c)(1)(A)); (2) plaintiff had attained age 62 (§ 202(c)(1)(B)); and (3) plaintiff was not entitled to old-age or disability insurance benefits

(§ 202(c)(1)(D)). As plaintiff was receiving a government pension within the period of December 1977 to November 1982 and meets the above requirements of § 202(c), plaintiff qualifies under the exception to the offset provisions, and therefore is entitled to receive his husband's insurance benefits.

Good cause appearing therefor,

IT IS ORDERED that plaintiff's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that plaintiff's benefits be reinstated.

IT IS FURTHER ORDERED that plaintiff receive back benefits from September 1978 to present.

DATED: March 13, 1981.

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 80-1667 RPA

SIDNEY WEBB, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS, Secretary of Health and Human Services, DEFENDANT

[Filed March 13, 1981]

JUDGMENT

This action coming before the Court and the issues having been duly presented by the parties' cross motions for summary judgment, and a decision having beeen duly rendered by an Order filed herein;

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of plaintiff and against defendant. Each party shall bear its own costs.
DATED: March 13, 1981.

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4256

DC#: CV-80-1667

SIDNEY J. WEBB, PLAINTIFF-APPELLEE

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

A TRUE COPY
ATTEST Mar 29, 1983
PHILLIP B. WINBERRY
Clerk of Court

By: /s/ Sigmon Zeleke
SIGMON ZELEKE
Deputy Clerk

Filed and entered March 7, 1983

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4256

D.C. CV 80-1667 R.P.A.

SIDNEY J. WEBB, PLAINTIFF-APPELLEE

v.

RICHARD S. SCHWEIKER,
Secretary of Health and Human Services,
DEFENDANT-APPELLANT

[Filed July 23, 1982]

Before: GOODWIN and ANDERSON, Circuit Judges, and JAMESON, District Judge*

ORDER

This appeal is resubmitted for decision effective upon the date of the filing of this order.

IT IS SO ORDERED.

---

* The Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4256

DC # CV 80-1667 R.P.A.

SIDNEY J. WEBB, PLAINTIFF-APPELLEE

v.

RICHARD S. SCHWEIKER,
Secretary of Health and Human Services,
DEFENDANT-APPELLANT

[Filed April 26, 1982]

Before: GOODWIN and ANDERSON, Circuit Judges, and JAMESON, District Judge*

ORDER

At the oral argument on this appeal, submission was deferred pending a decision of the United States Supreme Court in *Schweiker* v. *Rosofsky*, 523 F. Supp. 1180 (EDNY 1981), Supreme Court No. 81-1551.

IT IS SO ORDERED.

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*The Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

APPENDIX G

DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518
Washington, D.C. 20013

March 24, 1980

Office of
Hearings and Appeals

Refer to: SGC
549-16-7613

ACTION OF APPEALS COUNCIL
ON REQUEST FOR REVIEW

Mr. Sidney J. Webb
9 Descanso Drive
Orinda, California 94563

Dear Mr. Webb:

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, and the contentions made in support of the request.

Section 404.947a of Social Security Administration Regulations No. 4 (20 CFR 404.947a) provides that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by

substantial evidence, or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

In reaching this conclusion the Appeals Council considered the brief you filed but concurs with the administrative law judge's decision that your application is considered to have been filed in December 1977 and that the government pension reduction provisions apply. The Council also concurs in the administrative law judge's holding that he could not rule on the constitutionality of any of the provisions applicable to your case.

The Appeals Council rejects your contentions that you were denied due process because you should have received a revised initial determination instead of a reconsideration determination and because you were not afforded a pre-recoupment hearing. The initial determination that you are entitled to husband's insurance benefits remains in effect. You were properly given a reconsideration determination when you requested reconsideration in the initial determination that government pension reduction applied and that you were overpaid. There has been no recoupment of the overpayment because your benefits were suspended due to your government pension. Accordingly, you were not deprived of any right to a pre-recoupment hearing. Furthermore, the administrative law judge has waived recovery of the overpayment.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See section 205(g) of the Social Security Act, as amended (42 U.S.C. 450(g)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,

JOHN W. CHAMBERS
Member, Appeals Council

cc:

WNPSC, RR, RSI, Richmond, CA
DO, Walnut Creek, CA
HO, Oakland, CA (ALJ Goldhammer)

APPENDIX H

Dict. Letter
IE3005

SOCIAL SECURITY NOTICE

From: Western Program Service Center
Richmond, California 94802

Date: February 11, 1980
Claim Number: 549-16-7618-B1

Sidney J. Webb
9 Descanso Drive
Orinda, California 94563

It was the decision of the Administrative Law Judge that you were without fault in causing the $394.50 overpayment from December 1977 through August 1978. Therefore, recover of the overpayment on this account has been waived.

This action supersedes our previous determination.

If you have questions about your claim, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Bureau of Hearings and Appeals

Name and Address of Claimant:

Sidney J. Webb
9 Descanso Dr.
Orinda, CA 94563

NOTICE OF FAVORABLE DECISION
PLEASE READ CAREFULLY

The enclosed decision is favorable to you, either wholly or partly. *If you are satisfied with the decision, there is no need for you to do anything at the present time.* Further action on the decision will proceed automatically.

If you disagree with the decision, you have the right to request the Appeals Council to review it within *60* days from the date of *receipt* of the notice of this decision. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone these offices indicating your intent to request review. You may also submit a written request for review directly to the Appeals Council, Bureau of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

The Appeals Council may, on its own motion, within 60 days from the date shown below, review the decision, wihch could possibly result in a change in the decision. (20 CFR 404.947 and 416.1463). After the 60 day period, the Appeals Council generally may

only reopen and revise the decision on the basis of new and material evidence, or if a clerical error has been made as to the amount of the benefits or where there is an error as to the decision on the face of the evidence on which it is based. (20 CFR 404.957, 404.958, 405.750, 405.1570, 416.1477, and 416.1479). If the Appeals Council decides to review the enclosed decision on its own motion or to reopen and revise it, you will be notified accordingly.

Unless you timely request review by the Appeals Council or the Council reviews the decision on its own initiative, you may not obtain a court review of your case (section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act).

This notice and enclosed copy of
decision mailed

December 19, 1979

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Bureau of Hearings and Appeals

DECISION

In the case of
SIDNEY WEBB
(Claimant)

CHARLOTTE H. WEBB
(Wage Earner)
(Leave blank if same as above)

Claim for
WAIVER OF RECOVERY OF
HUSBAND'S INSURANCE BENEFITS

549-16-7618
(Social Security Number)

This case is before me following a timely request for hearing filed by the claimant who disagrees with the determination that he is not entitled to husband's insurance benefits and has been overpaid.

ISSUES

The general issue to be determined is whether the claimant was overpaid husband's insurance benefits and, if overpaid, whether or not the Social Security Administration is entitled to recover the overpayment. The specific issues are whether or not an overpayment occurred (which depends on whether or not the claimant is entitled to husband's insurance benefits) and if any overpayment occurred, whether re-

covery thereof would either (1) defeat the purpose of Title II of the Social Security Act or (2) be against equity and good conscience.

APPLICABLE LAW

Section 202(c) of the Social Security Act as amended by Public Law 95-261 enacted on December 20, 1977 provides that the husband of an individual entitled to old-age insurance benefits who has filed application for husband's insurance benefits, has attained age 62, and is not entitled to old-age or disability insurance benefits or is entitled to old-age disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife, shall be entitled to a husband's insurance benefit.

Section 202(c)(2)(A) (added by Public Law 95-216 enacted December 20, 1977) provides:

> "The amount of a husband's insurance benefit for each month as determined after application of the provisions of subsection (q) and (k) shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal government or any State (or political subdivision thereof, as defined in section 218(b)(2)) if, on the last day he was employed by such entity, such service did not constitute 'employment' as defined in section 210."

Section 334(f) of Public Law 95-216 provides:

> "The amendments made by this section shall apply with respect to monthly insurance benefits

payable under Title II of the Social Security Act for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted."

Section 334(g) of Public Law 95-216 provides:

"(1) The amendments made by the proceding provisions of this sections shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f) or (g) (as the case may be) of section 202 of the Social Security Act, to an individual—

(A) to whom there is payable for any month within the 60 month period beginning with the month in which this Act is enacted (or who is eligible in any such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b)(2) of the Social Security Act); and

(B) Who at time of application for or initial entitlement to such monthly insurance benefit under subsection (b), (c), (e), (f) or (g) meets the requirements for that subsection as it was in effect and being administered in January 1977."

Section 404.510a of Social Security Regulations No. 4 provides that a benefit payment under Title II of the Act to or on behalf of an individual who fails to meet one or more requirements for entitlement to such payment or if the payment exceeds the amount

to which he is entitled, constitutes an entitlement overpayment. Where an individual or other person on behalf of an individual accepts such overpayment because of reliance on erroneous information from an official source within the Social Security Administration with respect to the interpretation of a pertinent provision of the Social Security Act or Regulations pertaining thereto, such individual in accepting such overpayment, will be deemed to be "without fault."

Section 404.512(a) of Social Security Regulations No. 4 states that in situations described in section 404.510a, adjustment or recovery will be waived since adjustment or recovery will be deemed "against equity and good conscience."

EVIDENCE CONSIDERED

The administrative law judge has carefully considered all the testimony and arguments at the hearing and all the documents described in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

The claimant testified that his wife, Charlotte Webb, who was born October 11, 1912, applied for retirement benefits the month before he applied. The claimant worked as a financial examiner for the Public Utilities Commission for the State of California. He testified that he filed his application for husband's benefits, in September 1977, at the suggestion of the person handling his wife's application. He was not certain when he became aware of the offset provisions but agreed that it was probably after he received notice from the Social Security Administration that he had been overpaid.

The claimant contends (See Exhibit 22) that he is still entitled to husband's insurance benefits. He correctly points out that the United States Supreme Court in *Califano* v. *Goldfarb* (1977) 430 U.S. 199 declared section 202(c)(1)(C) of the Social Security Act unconstitutional. This subsection, which was deleted by Public Law 95-216, enacted December 20, 1977, provided that an individual applying for husband's insurance benefits was not eligible unless he was receiving at least one-half of his support from his wife at the time she became entitled to old-age or disability insurance benefits. The claimant filed for husband's benefits on September 21, 1977 (Exhibit 2) and was awarded these benefits, to begin in December 1977, in a social security award certificate dated October 31, 1977 (Exhibit 11). The claimant began receiving monthly retirement benefits in excess of $1500 from the State of California in April 1977 (Exhibit 17). The claimant argues that section 334(f) of Public Law 95-216 applies the offset provisions found in section 202(c)(2) of the Social Security Act only to individuals receiving benefits beginning with December 1977 on the basis of applications filed in or after December 1977. Since he filed for benefits in September 1977, he argues that the offset provisions should not apply to him.

It is my role, as Administrative Law Judge, to interpret the Social Security Act, as amended by legislation, consistent with the United States Constitution; I have no authority to decide whether any portion of the Act is or is not Constitutional. Under section 334(g)(1)(A) and (B) the claimant is subject to the offset provisions incorporated in section 202(d) of the Social Security Act by Public Law 95-216, because at the time of his application for, *and*

"initial entitlement" to husband's insurance benefits, he did not meet the one-half support requirement in effect, and being administered in January 1977. The claimant began receiving his $1500 per month State pension in April 1977 and does not contend that his wife provided one-half of his support either in September 1977, when he filed his application, or in December 1977, when he became initially entitled to husband's insurance benefits because he became age 62. I cannot rule on the issue of whether or not section 334(g)(1)(B) of the Public Law 95-216 as enacted on December 20, 1977 is constitutional, although its constitutionality may be questionable in view of the *Goldfarb* decision which struck down the support requirements as eligibility criteria for husband's insurance benefits.

The claimant argues that the offset provisions enacted by Public Law 95-216 do not apply to him because he filed his application on September 21, 1977. Section 334(f) provides that the amendments made by that section apply to monthly insurance benefits payable under Title II of the Act for months beginning with "applications filed in or after" December 1977.

The claimant, however, was not entitled to benefits in September, October or November 1977 as he had not yet reached age 62. An "application" is not "filed" unless and until the claimant meets the conditions of entitlement to the benefits for which he has applied. To accept the claimant's argument is to, in effect, let "the tail wag the dog." He argues that the fact that his application was filed in September 1977, when he was not entitled to benefits because he was not age 62, allows him to become entitled to benefits

for which he could not have been entitled had he applied at any time on or after he met all conditions of entitlement. To accept the claimant's interpretation of the law would create an invidious discrimination against those applicants who filed for their benefits on or after they met all conditions of entitlement and in favor of those who fortuitously filed for benefits before they met basic conditions of entitlement. I do not believe that it was Congress' intent to provide the inequity and invidious discrimination which would result from the claimant's interpretation. Accordingly, I cannot find that the claimant is excluded from the offset provisions of section 202(e) of the Social Security Act simply because his application was lodged in September 1977.

In the reconsidered determination, the Social Security Administration relied on section 202(j)(2) of the Act and distinguished the claimant's application of September 1977 from a "valid" application. Section 202(j)(2) was designed to protect individuals who filed before they met eligibility criteria so that such individuals would not have to re-file their applications. Whether or not section 202(j)(2) is directly applicable here, the distinction between an application filed before the applicant satisfies eligibility criteria and an application filed when the applicant satisfies eligibility criteria should be applicable here. Applying section 202(j)(2) directly seems tortuous because section 334(f) of P.L. 95-216 makes no distinction between applications and "valid" applications. The rubric used is unimportant. The reconsidered determination refers to a difference between an application and a "valid" application. I suggest it may be more useful to think of the dif-

ference between the lodging of an application and the filing of one. In either case, the point is that the claimant's application of September 1977 did not entitle him to benefits then because he did not meet eligibility criteria then. If Congress had entirely eliminated the husband's insurance benefit program in October 1977, the claimant surely could not argue that any right had vested in him. Since the claimant's application of September 1977 did not entitle him to benefits then, because he was not age 62, he should not be entitled to any fortuitous advantages over those who properly filed in December 1977 because they met all eligibility criteria then.

The argument that the offset provision's application is unconstitutional rests on the proviso that the provision only applies to those who did not meet the support requirement in effect for January 1977. Since the support requirement was found unconstitutional, the argument is that the proviso in 334(g)(1)(B) is also unconstitutional. I have no authority to rule on the constitutionality of 334(g)(1)(B); all that I hold is that the claimant is within the class affected by 334(g)(1)(B) and may not sever himself from that class because he filed an application (lodged an invalid application) in September 1977. The claimant was not eligible for benefits in December 1977 because section 334(g)(1)(B) says so—the claimant did not meet the support requirements in effect in January 1977. Even if the support requirement embodied in section 334(g)(1)(B) of P.L. 95-216 is unconstitutional, the question would still remain whether or not the offset provision would stay valid since the provisions of P.L. 95-216 are severable. In other words, it could be held that the government pen-

sion offset applied to everyone applying for husband's insurance benefits who has such a pension whether or not the individual met the support requirements.

A question also remains concerning the retroactive application of Public Law 95-216. The claimant turned age 62 on December 2nd and P.L. 92-216 was enacted on December 20th. Whether the claimant had a vested property right on December 2nd which he was deprived of on December 20th without due process of law is not a question which I have the authority to decide since I have no authority to decide the constitutionality of the legislation. It is clear, however, that if Public Law 95-216 had been enacted prospectively only, then the claimant would not have been affected by the offset provisions and would have been entitled to husband's insurance benefits.

The record shows that the claimant received $394.50 in retirement insurance benefits from December 1977 until August 1978 (Exhibit 4) and the claimant does not contest the actual amount of benefits he received. As I have found the claimant was not entitled to husband's insurance benefits because of the application of the offset provisions of section 202(c)(2) of the Act, the claimant was overpaid all the benefits he received. The claimant argues, in effect, that he falls within the provisions of section 404.510a and should be found "without fault" in accepting the overpayment as he relied upon the Social Security award certificate dated October 31, 1977. I agree and find that the claimant was without fault as to the full overpayment of $394.50. The claimant testified that he was not sure when he became aware of the offset provisions of section 202(c)(2) of the Social Security Act and I find his testimony credible. The claimant

cannot be charged with knowledge of the complicated legislation respecting his entitlement to benefits. Accordingly, adjustment or recovery of the overpayment must be waived as adjustment or recovery is deemed "against equity and good conscience" pursuant to section 404.512 of Social Security Regulations No. 4, regardless of the claimant's ability to repay the overpayment which is conceded by him.

FINDINGS

After having considered all the evidence, I find based upon the preponderance of the evidence, as follows:

1. On September 21, 1977, the claimant applied for husband's insurance benefits based on the earnings of his wife, Charlotte Webb, who was born on October 11, 1912.
2. The claimant was born on December 2, 1915.
3. The claimant began receiving monthly state retirement payments exceeding $1500 in April 1977.
4. The claimant did not meet the requirements of subsection 202(c) as in effect and being administered in January 1977 at the time of his application (September 21, 1977) or at the time he met all factors of eligibility (December 2, 1977).
5. The claimant's husband's insurance benefit must be offset by the amount of his government pension.
6. As the claimant's government pension at all times exceeded the amount of his husband's insurance benefit, he was overpaid $394.50 from December 1977 through August 1978.

7. The overpayment in question is an entitlement overpayment as defined in section 404.510a of Social Security Regulations No. 4. The claimant relied on his award of benefits, constituting erroneous information from an official source from the Social Security Administration, in accepting the overpayment and thus he is deemed to be "without fault."

8. Adjustment or recovery of the overpayment is deemed against equity and good conscience pursuant to section 404.512 of Social Security Regulations No. 4 and thus adjustment or recovery must be waived.

DECISION

It is my decision, with respect to the application for husband's insurance benefits filed on September 21, 1977, that the claimant is not entitled to husband's insurance benefits; that he was overpaid $394.50 in husband's insurance benefits; and that adjustment or recovery of the overpayment, in its entirety, is hereby waived.

/s/ Alan Goldhammer
ALAN GOLDHAMMER
Administrative Law Judge
Office of Hearings And Appeals
1330 Broadway, Suite 930
Oakland, California 94612

Date: December 19, 1979

APPENDIX I

SOCIAL SECURITY
NOTICE OF RECONSIDERATION

From: Bureau of Retirement and
Survivors Insurance
Western Program Service Center
Richmond, California 94802

Date: March 26, 1979

Your Claim Number:
549-16-7618 B1

Sidney J. Webb
9 Descanso Drive
Orinda, California 94563

Your claim has been reconsidered, as you requested. We find that the original decision was correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision reached.

This reconsideration was made by a specially designated staff, different from the staff that made the original decision, and specially trained in the handling of reconsiderations. This staff made an independent and thorough examination of all the evidence on record about your claim.

If you believe that the Reconsideration Determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing you must request it, not later than 60 days from the date you receive this notice. You should make any such re-

quest through any social security office. Please read the enclosed leaflet for a full explanation of your right to appeal.

Enclosures:
SSA-662
HEW Publication No. (SSA) 76—10282—BHA-1

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

RECONSIDERATION DETERMINATION

Program Center
Western Program Service Center

District Office or Branch Office
Walnut Creek, California

Name of Wage Earner or Self-Employed Person

Social Security Claim No.
549-16-7618-B1

Name of Claimant
Sidney J. Webb

Type of Claim
Husband's Insurance Benefits

Determination:

On September 21, 1977, Signey J. Webb, whose date of birth is December 2, 1915, filed an application for husband's insurance benefits. On October 31, 1977, Mr. Webb was notified that he was entitled to monthly benefits effective December 1977 in the amount of $42.90. He was also advised that he was not entitled to benefits on his own earnings record because he had not worked long enough under social security to meet the insured status requirement.

On September 6, 1978, Mr. Webb was notified that since his government pension exceeded his monthly benefit amount, no social security benefits were payable. On September 8, 1978, the claimant was advised that he had been overpaid in the amount of $394.50 for December 1977 through August 1978. On September 14, 1978, Mr. Webb filed a request for reconsideration giving as his reasons:

> "I was told if I filed prior to December 1, 1977, I would not be subjected to the offset. I, therefore, disagree with the overpayment due to the offset."

The issue to be decided is whether monthly benefits as a spouse should be paid to the claimant. This depends on whether his monthly benefit amount is subject to the government pension offset as provided under the 1977 Amendments to the Social Security Act.

Section 202(c)(1) of the Social Security Act, as amended, as pertinent here, provides that the husband of an individual entitled to old-age benefits shall be entitled to a husband's insurance if such husband

(A) has filed an application for husband's insurance benefits.

(B) has attained age 62 and

(C) is not entitled to old-age or disability insurance benefits or is not entitled to old-age or disabiilty insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

Section 202(c)(2)(A) of the Social Security Act provides that the amount of a husband's insurance benefit for each month as determined after applications of the provisions of subsections (q) and (k) shall be reduced, but not below zero, by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State (or political subdivisions thereof as defined in Section 218(b)(2)) if, on the last day he was employed by such entity, such service did not constitute "employment" as defined in Section 210 of the Social Security Act.

The Government pension offset will not apply if:

(1) The applicant would at the time of filing for husband's insurance benefits meet the requirements for entitlement to those benefits as they were in effect and being interpreted in January 1977; and

(2) The applicant is receiving, or upon filing could have received a government pension for any month in the period December 1977 to November 1982.

Since the one-half support requirement was in the Social Security Law and being applied in January 1977, this requirement must be applicable to the current claim.

Section 202(j)(2) of the Social Security Act provides that an application for any monthly benefits under the section filed before the first month in which the applicant satisfies the requirement for such benefits shall be deemed a valid application only if the applicant satisfies the requirements for such benefits before the Secretary makes a final decision

on the application. If upon final decision by the Secretary, or decision upon judicial review thereof, such applicant is found to satisfy such requirements, the application shall be deemed to have been filed in such first month.

Regulations No. 4, Section 404.606 of the Social Security Administration also provides that an application for monthly benefits filed before the first month in which the claimant meets all conditions of entitlement for such benefits will be deemed a valid application if such conditions are met before the Secretary makes a final decision on such application. If upon final decision by the Secretary, the claimant is found to have met such conditions, the application will be deemed to have been filed in the first month in which he met such conditions.

Public Law 95-216, section 334(b)(2) provides that for benefits payable for months beginning in December 1977 on the basis of an application filed in or after December 1977 the government pension offset will apply.

On the application for husband's insurance benefits Mr. Webb replied "No" to the question "Were you receiving at least one-half of your support from your wife at the time she became entitled to retirement insurance benefits?"

On July 21, 1978, Mr. Webb signed a statement acknowledging that he was receiving a monthly pension from the State of California (Public Employee's Retirement System) of $1,592.97 before any deductions for health allotments or bonds.

On December 18, 1978, Mr. Webb submitted a signed statement that "Inasmuch as I filed my application for husband's insurance benefits on September 21, 1977, and atained age 62 on December 2, 1977,

and was not entitled to old-age or disability insurance benefits, I became entitled to a husband's insurance benefit beginning with the month of December 1977 —there does not appear to be any justification for using the words "effectively filed or effective filing" when I actually filed my application in September 1977, and actually satisfied the requirements upon attainment of age 62 on December 2, 1977, all prior to the enactment of the Social Security Amendments of 1977".

Although Mr. Webb filed an application on September 21, 1977, the first month that all requirements for husband's insurance benefits were met is December 1977, the month of attainment of age 62. The claimant's application for husband's insurance benefits filed on September 21, 1977, was not deemed a valid application before December 1977; he was not receiving one-half of his support from his wife; and he is receiving a government pension in excess of $1,500.00 per month. Therefore, his husband's insurance benefit must be offset by the amount of his government pension.

Thus the initial determination is affirmed.

Mr. Webb received benefits at the rate of $42.90 for the months of December 1977 through May 1978 and $45.70 for June 1978 through August 1978. Since his monthly benefit amount should have been offset by the amount of his government pension, he has been overpaid $394.50.

AUTHORITY: Section 202(c)(1), 202(c)(2)(A), 202(j)(2) of the Social Security Act. P.L. 95-216 Section 334(b)(2) and Regulations No. 4 Section 404.606 of the Social Security Administration.

March 26, 1979
DATE

cc: District Office—Walnut Creek, CA
Reading File
Dictator
VYoung:mg
SPRF9331-2

APPENDIX J

STATUTORY PROVISIONS INVOLVED

1. Section 202(c) of the Social Security Act, 42 U.S.C. (Supp. V) 402(c), provides in pertinent part:

> (1) The husband (as defined in section [216 (f)] of this title) of an individual entitled to old-age or disability insurance benefits, if such husband—
>
> (A) has filed application for husband's insurance benefits,
>
> (B) has attained age 62, and
>
> (C) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,
>
> shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs: he dies, his wife dies, they are divorced, he becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to the old-age insurance benefits.
>
> (2)(A) The amount of a husband's insurance benefit for each month as determined after application of the provisions of subsections (q) and (k) of this section shall be reduced (but

not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section [218(b)(2)] of this title) if, on the last day he was employed by such entity, such service did not constitute "employment" as defined in section [210] of this title.

2. Former Section 202(c) of the Social Security Act, 42 U.S.C. 402(c), provides in pertinent part:

(1) The husband (as defined in section [216(f)] of this title) of an individual entitled to old-age or disability insurance benefits, if such husband—

(A) has filed application for husband's insurance benefits,

(B) has attained age 62,

(C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual—

(i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to such benefits, or

(ii) if she did not have such a period of disability, at the time she became entitled to such benefits,

and filed proof of such support within two years after the month in which she filed appli-

cation with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit for each month, begining with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs: he dies, his wife dies, they are divorced, he becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

3. Section 334(g) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note, provides:

(1) The amendments made by the preceding provisions of this section [section 334 of Pub. L. 95-216] shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of section 202 of the Social Security Act, to an individual—

(A) to whom there is payable for any month with the 60-month period begining with the month in which this Act is enacted (or who is eligible in any such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b)(2) of the Social Security Act); and

(B) who at time application for or initial entitlement to such monthly insurance benefit under such subsection (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January 1977.

(2) For purposes of paragraph (1)(A), an individual is eligible for a monthly periodic benefit for any month if such benefit would be payable to such individual for that month if such individual were not employed during that month and had made proper application for such benefit.

(3) If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

4. Section 202(j)(2) of the Social Security Act, 42 U.S.C. (Supp. V) 402(j)(2), as amended by Section 306(a), Pub. L. No. 96-265, 94 Stat. 457, provides in pertinent part:

(2) An application for any monthly benefits under this section filed before the first month in

which the applicant satisfies the requirements for such benefits shall be deemed a valid application (and shall be deemed to have been filed in such first month) only if the applicant satisfies the requirements for such benefits before the Secretary makes a final decision on the application and no request under section [205(b)] of this title for notice and opportunity for a hearing thereon is made or, if such a request is made, before a decision based upon the evidence adduced at the hearing is made (regardless of whether such decision becomes the final decision of the Secretary).

5. Section 204(b) of the Social Security Act, 42 U.S.C. 404(b), provides in pertinent part:

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this [title] or would be against equity and good conscience.

6. Section 334(f) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note, provides:

> (f) The amendments made by this section [Section 334 of Pub. L. No. 95-216] shall apply with respect to monthly insurance benefits payable under title II of the Social Security Act for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted.

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